No. 96-1628

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN; LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN; SAUL B. COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY;

(caption continued on inside front cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT CITY OF YONKERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO as Director of the Urban Development Corporation,

Petitioners,

vs.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

QUESTIONS PRESENTED

1. WHETHER THE SECOND CIRCUIT, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORTED FACTUAL FINDINGS IN THIS CASE, CORRECTLY FOUND THE STATE PETITIONERS LIABLE FOR INTENTIONAL SEGREGATION WHERE STATE OFFICIALS "FAILED TO EXERCISE THEIR AUTHORITY AND FAILED TO FULFILL THEIR RESPONSIBILITY TO TAKE STEPS TO ACHIEVE DESEGREGATION IN YONKERS, AND INSTEAD TOOK ACTIONS THAT ENCOURAGED THE PERPETUATION OF SEGREGATION, BECAUSE OF THEIR DEFERENCE TO THE RACIALLY INSPIRED POSITIONS OF THE LOCAL OFFICIALS AND THE KNOWN ANTI-DESEGREGATION STANDS OF OTHER STATE OFFICIALS."

2. WHETHER THE SECOND CIRCUIT'S HOLDING THAT THE EQUAL EDUCATIONAL OPPORTUNITY ACT (EEOA) EXPRESSLY ABROGATES THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT NECESSARY TO EFFECTUATE THE PURPOSES OF THE EEOA IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS WHERE THE STATUTE EXPRESSLY PROHIBITS STATES FROM DENYING EQUAL EDUCATIONAL OPPORTUNITY AND AUTHORIZES SUITS AGAINST STATE AND LOCAL EDUCATIONAL AGENCIES.

3. WHETHER THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST THE STATE UNDER THE EEOA IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE PREVIOUS DECISIONS OF THE COURTS OF APPEALS.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, respondent City of Yonkers states that it does not have a corporate parent, subsidiary, or affiliate.

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RESPONDENT CITY OF YONKERS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent City of Yonkers, New York ("the City") respectfully asks this Court to deny the State of New York's petition for writ of certiorari filed in this cause. Given strong factual findings in the district court, the United States Court of Appeals for the Second Circuit properly concluded that the State of New York and its officials were liable for school segregation in the City of Yonkers where the State petitioners (1) knew of de jure school segregation in Yonkers, New York, and (2) "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known

anti-desegregation stance of other state officials." *United States v. City of Yonkers*, 96 F.3d 600, 618–19 (2d Cir. 1996); Pet. App. at 44a. The Second Circuit's decision is wholly consistent with the previous decisions of this Court and of the several Courts of Appeals and does not warrant this Court's review.

OPINIONS BELOW

Respondent City of Yonkers adopts the petitioners' statement of opinions below. Pet. at 2.

JURISDICTION

Respondent City of Yonkers adopts the petitioners' statement of jurisdiction. Pet. at 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent City of Yonkers adopts the petitioners' statement of constitutional and statutory provisions involved. Pet. at 2.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

In 1985, the United States District Court for the Southern District of New York found that the Yonkers Public Schools were unconstitutionally segregated. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (1985) ("*Yonkers I*").[1] The district court found the City of Yonkers liable for discrimination in housing and education, the Yonkers Board of Education ("Board") liable for school segregation and, in 1986, entered appropriate remedial orders. *See id; United States v. Yonkers Bd. of Educ.*, 635 F. Supp. 1538 (S.D.N.Y. 1986) (School Desegregation Order) ("*Yonkers II*") and 635 F.

[1] The City adopts the Second Circuit's short titles for the many decisions in this longstanding litigation.

Supp. 1577 (S.D.N.Y. 1986) (Housing Remedy Order).[2] The Second Circuit affirmed these decisions, and this Court denied review. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987) ("*Yonkers III*"), *cert. denied*, 486 U.S. 1055 (1988).

In 1987, the NAACP moved to add the State of New York, certain State officials, and the New York State Urban Development Corporation ("UDC") as parties defendant. Pet. App. at 157a–169a. The Board similarly sought leave to file a cross-claim against these added State defendants. Pet. App. at 140a–156a. The NAACP and the Board alleged that the State defendants should be compelled to participate in the existing school and housing remedies and to assist in eliminating the vestiges of school segregation, because the State defendants had known of the de jure segregation in Yonkers and had the authority and duty to eliminate segregation, but had, through action and inaction, contributed to school and housing segregation in response to race-related political pressures. *See* Pet. App. at 140a–169a. Although denying that there were additional vestiges of segregation in the Yonkers Public Schools for which the City should be held responsible, the City supported the NAACP's and the Board's claims that the State defendants were liable for segregated conditions in Yonkers. *See* Pet. App. at 6la.

After some procedural delay and several interlocutory, immunity-based appeals by the State defendants, the district court severed the issues raised in the 1987 complaint and

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[2] Proceedings involving the 1986 Housing Remedy Order have taken a favorable turn in the recent past. On November 6, 1996, the district court, on consent of the parties, entered the Second Supplemental Long Term Plan Order, providing a means to implement all remaining aspects of the Housing Remedy Order. Under the 1996 Order, control over the administration of the remedy has been returned to the City of Yonkers and its Mayor from court-appointed agents. The City of Yonkers has established its own Affordable Housing Department which is aggressively seeking to create affordable housing opportunities for qualified applicants in all parts of Yonkers.

cross-claim for trials on the issues of (1) whether unaddressed vestiges of unlawful segregation continue in the Yonkers Public Schools; (2) whether the State defendants are liable; and (3) what remedies are appropriate. After hearing evidence related to the vestiges issue, the district court determined that the Board had "achieved desegregation of enrollments among the schools," but that vestiges of segregation remained to be remedied. *See United States v. City of Yonkers,* 833 F. Supp. 214, 216 (S.D.N.Y. 1993) ("*Yonkers IV*").[3]

In the spring of 1994, the district court held a six-week trial on the issue of whether the State defendants should be held liable for the segregated conditions found by the Court in its 1985 liability decision as well as for the vestiges of segregation in the Yonkers Public Schools. As the Second Circuit noted, "the [district] court received thousands of exhibits and received testimony from more than 30 witnesses, including members and former members of the New York Board of Regents, a former Commissioner, a former Deputy Commissioner, key officials from the State Education Department" and "City officials and community leaders who had interacted with [the State defendants] on school and housing matters." Pet. App. at 8a. The district court issued two liability opinions. The first included the bulk of its factual findings and addressed the claims against the State defendants under the Equal Protection Clause and 42 U.S.C. § 1983. *See United States v. City of Yonkers,* 880 F. Supp. 212 (S.D.N.Y. 1995) ("*Yonkers V*"); Pet. App. at 56a–117a. The second addressed the claims against the State defendants under Title VI and the Equal Educational Opportunity Act ("EEOA"). *See United States v. City of Yonkers*, 888 F. Supp. 591 (S.D.N.Y. 1995) ("*Yonkers VI*"); Pet. App. at 118a–137a.

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[3] The district court's vestiges decision has not yet been embodied in a final judgment and, therefore, was not before the Second Circuit on appeal. Pet. App. at 7a. The district court also has not yet addressed remedy issues.

B. The District Court's Opinions.

In its first State liability opinion, the district court made extensive factual findings based upon the evidence it had heard and received during the 1994 State liability trial. The State defendants largely ignore these findings in their petition for certiorari because, as the Second Circuit noted, these findings were "largely favorable to plaintiffs." *See* Pet. App. at 8a. Indeed, the State defendants challenged only one of these factual findings on appeal. *See* Pet. App. at 34a.

Specifically, the district court found that the State defendants "knew of the segregation in Yonkers, had actual or constructive knowledge that this segregation was de jure, had the power to take steps to remedy that segregation, and refused to exercise that power because they were capitulating to political pressures that they knew were racially motivated." *See* Pet. App. at 31a–32a. The Second Circuit affirmed these factual findings and summarized them, as follows:

> In detail, the district court found, *inter alia,* that
>
> > - the State was aware of circumstances that should have alerted it to Yonkers's unlawful segregation of its schools, and "if in fact the State defendants were not so alerted, it was because they themselves chose to remain ignorant" "in the face of actual conflicting evidence,"
>
> *Yonkers V,* 880 F. Supp. at 219, 220;
>
> > - the State had "actual or constructive[ ] knowledge of illegal racial segregation in the Yonkers public schools,"
>
> *id.* at 220;
>
> > - the State had "full knowledge of the nature, cause and extent of the segregation in the Yonkers public schools,"
>
> *id.* at 245;

- the State "knew that Yonkers," "if left to its own devices, was not going to remedy the segregation voluntarily,"

id. at 219, 220. The court also found, *inter alia,*

- that in other communities, Commissioner Nyquist had "not hesitate[d] to enforce the [New York] racial integration policy,"

id. at 225;

- that the legislature responded to Nyquist's desegregation efforts with a statute that "prohibited State education officials, as well as local school districts with appointed school boards, from assigning students for the purpose of achieving racial balance or of taking other desegregative actions,"

id.;

- that, after that statute was declared unconstitutional, the legislature took other actions whose "purpose and intended effect" were "similar" and "had the cumulative effect of undermining efforts to reduce school segregation,"

id.;

- that the legislature also adopted "a new practice" of having candidates for the Board of Regents be "interviewed prior to appointment by legislators . . . who were known to be hostile to vigorous desegregation efforts,"

id.;

- that the Regents revised their policy statement on segregation so as to "dilute[ ] [its] pro-desegregation force,"

id.;

> - that this revision was a response to "criticism of Commissioner Nyquist's vigorous desegregation efforts,"

id.;

> - that the Board of Regents lobbied for legislation providing for stricter judicial review of the Commissioner's § 310 orders in an effort to "rein in Nyquist's desegregation efforts,"

id. at 226; and

> - that the Board of Regents finally simply fired Nyquist; "[h]is views on [integration] were a substantial factor leading to his discharge,"

id.

United States v. City of Yonkers, 96 F.3d at 614; Pet. App. at 32a–34a (omissions and alterations in original).[4]

Notwithstanding these strong factual findings, the district court stated that it was "constrained" to find that the State defendants were not liable under the district court's interpretation of the Second Circuit's opinion in *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir.), *cert. denied,* 439 U.S. 860 (1978). Pet. App. at 116a. In essence, the district court believed that proof of specific approval and support of local authorities' unlawful conduct, and not mere knowing inaction or action, was necessary to impose liability upon the State defendants under *Arthur. See* Pet. App. at 98a–99a. The district court explained, however, that it reached this conclusion "with reluctance," because it found "entirely unpersuasive" the State defendants' arguments that they lacked full knowledge of the nature,

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[4] In their Statement of the Case, the State petitioners present factual arguments regarding alleged efforts of the State with regard to desegregation. Pet. at 5–6. These "facts" were not found by the district court and are, indeed, directly contrary to the actual findings of the district court described above, as affirmed by the Second Circuit. State petitioners improperly raise these factual arguments here.

cause and extent of segregation in the Yonkers Public Schools, and that they "lacked the power to address adequately the problem of school segregation." Pet. App. at 116a.

In its second liability opinion, the district court addressed issues concerning State liability under Title VI and the EEOA. Based largely upon its interpretation of *Arthur v. Nyquist,* the district court similarly held that the State defendants were not liable for school segregation under these statutes. *See* Pet. App. at 118a–137a, 24a–25a.

C. The Second Circuit's Decision.

The Second Circuit determined that the district court's findings of fact were supported by the evidence; concluded that those findings distinguished the *Yonkers* case from the *Arthur* decision and warranted the imposition of State liability; and vacated the district court's dismissal of the equal protection and EEOA claims against the State defendants. The Second Circuit began its analysis of the equal protection claims by restating well-established "fundamental principles governing equal protection claims" that the Second Circuit had previously set forth in its consideration of City and Board liability in the first *Yonkers* appeal. *See Yonkers III,* 837 F.2d at 1216–17, 1222–26. The Court of Appeals explained that a plaintiff must show that the State action complained of was motivated at least in part by a racially discriminatory purpose. The Court then repeated its *Yonkers III* holding that "the foreseeability of a segregative effect, or 'adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance,' is a factor that may be taken into account in determining whether acts were undertaken with segregative intent." Pet. App. at 28a (quoting *Yonkers III,* 837 F.2d at 1227 (other internal quotation marks omitted)).

After thoroughly reviewing the evidence before the district court, the Second Circuit concluded that "the record evidence amply supports the district court's finding that the State defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew

or should have known that the school segregation in Yonkers was de jure." Pet. App. at 37a. The Court of Appeals explained that these "amply supported factual findings" distinguished the case from *Arthur v. Nyquist,* because in *Arthur* there had been insufficient evidence to show that the State officials had abdicated their duty to attempt to achieve desegregation. *United States v. Yonkers,* 96 F.3d at 617; Pet. App. at 40a–41a. The Second Circuit accordingly concluded that the State defendants' knowledge of Yonkers segregation, their failure to exercise their authority and responsibility to achieve desegregation in Yonkers, and their actions and omissions taken in reaction to "racially inspired positions of the local officials and the known anti-desegregation stance of other state officials" were a sufficient basis for liability under § 1983 for prospective injunctive relief to remedy vestiges of school segregation in Yonkers. *Id.* at 618–19; Pet. App. at 41a–44a.

The Court of Appeals similarly held that the State defendants were liable under the EEOA. The Court reasoned that the EEOA imposed "on States the obligation to enforce the equal-educational-opportunity obligations of local educational agencies," and provided protections similar to those provided by the Equal Protection Clause. *Id.* at 620; Pet. App. at 47a. Because it had found the State defendants liable under Section 1983 and the EEOA, the Court of Appeals declined to address the plaintiffs' Title VI claims. *See id.* at 621; Pet. App. at 51a.

The Second Circuit vacated the judgment of the district court, which had dismissed the claims against the State defendants, and remanded the case for further proceedings. *Id.* at 623; Pet. App. at 55a. The Second Circuit denied the State's request for en banc consideration. Pet. App. at 138a–139a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SECOND CIRCUIT, APPLYING WELL-ESTABLISHED PRECEDENT TO THE AMPLY SUPPORTED FACTUAL FINDINGS IN THIS CASE, CORRECTLY FOUND THE STATE DEFENDANTS LIABLE FOR CONTRIBUTING TO SEGREGATION.

Given the district court's "amply supported factual findings," there is nothing remarkable about the Second Circuit's finding of State liability. This Court has clearly held that liability exists where the state action complained of was taken with the intent to discriminate. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). A plaintiff must establish that race was "a motivating factor," and can do so in several ways. The Second Circuit has now twice discussed in this case the circumstances under which state action or inaction taken in response to racially motivated political pressure can serve as a basis of liability. *See Yonkers III*, 837 F.2d at 1216–18, 1221–27; Pet. App. at 26a–31a. In *Yonkers III*, the Court of Appeals stated that "adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance, is a factor that may be taken into account in determining whether acts were undertaken with segregative intent," *Yonkers III*, 837 F.2d at 1227 (internal quotation marks omitted), and concluded "that the forbidden segregative intent was established where governmental defendants took actions in response to and in accordance with community pressures that they knew were racially motivated." Pet. App. at 28a. These standards of liability are well-established and not disputed, although they are largely ignored in the State's petition.

The Second Circuit in the present appeal did nothing more than apply these precedents to the "amply supported factual findings" in this case. The Second Circuit concluded that "the

record evidence amply supports the district court's finding that the State Defendants had full knowledge of the nature, cause, and extent of the segregation in the Yonkers schools, and that they knew or should have known that the school segregation in Yonkers was de jure." Pet. App. at 37a. The record is replete with evidence that officials of the State Education Department ("SED") had abundant contact with the Yonkers Public Schools, knew of the unremedied segregation in the schools, and reacted to state and local opposition to desegregation. *See* Pet. App. at 34a–37a. The Court of Appeals also determined that there was "ample support" for the district court's "finding that the failure of SED officials to take action toward desegregation in Yonkers, though they took remedial action in other cities, was the result of heavy pressure from the New York State legislature." Pet. App. at 37a–38a.

In its petition, the State petitioners seek to recharacterize the findings of the district court by arguing that liability in this case was based "solely" on the determination that State officials "failed to exercise [their] power in a way the court believed would have been more effective." Pet. at 14. The State, however, ignores both the Second Circuit's and the district court's determination that State officials both acted and failed to act in response to racially motivated political pressures. The district court specifically found that the New York Legislature had passed legislation intended to undermine efforts to reduce school desegregation; that the Legislature sought to have candidates for the Board of Regents interviewed by "legislators . . . who were known to be hostile to vigorous desegregation efforts"; and that the Board of Regents fired Education Commissioner Nyquist and that "[h]is views on [integration] were a substantial factor leading to his discharge." Pet. App. at 76a–80a, 32a–34a.

State liability here is not based on mere inaction. Rather, it is grounded in the trial and appellate courts' determination that State officials had full knowledge of school segregation in Yonkers and that those State officials "failed to exercise their authority and failed to fulfill their responsibility to take steps to achieve desegregation in Yonkers, and instead took

actions that encouraged the perpetuation of segregation, because of their deference to the racially inspired positions of the local officials and the known anti-desegregation stance of other state officials." Pet. App. at 44a.

Throughout their argument, the State petitioners also suggest that their actions and inaction were not causally related to the continuing segregation in the Yonkers Public Schools. The State petitioners boldly assert that "no *state* governmental policy existed as the moving force behind the constitutional deprivation which occurred in Yonkers." Pet. at 13 (emphasis in original). This contention is incorrect and directly contrary to the findings of the district court. In the portion of its findings entitled "The Effect on Yonkers of the State's Failure to Intervene," the district court very carefully detailed its findings concerning the causal relationship between State action and inaction and the continuing segregation. *See* Pet. App. at 80a–82a. The district court expressly found that "there is every reason to believe that had the State brought its coercive powers to bear in Yonkers, Yonkers would have complied with its directions," Pet. App. at 80; that the State defendants "altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform," *id.*; and that by delaying funding for desegregation, the State "enabled opposition to the reform efforts to coalesce to a point where the [Board] became hostile to the very desegregation initiative it had originally commissioned." Pet. App. at 8la. Additionally, the district court concluded that the Board of Regents' firing of Commissioner of Education Ewald Nyquist, which the court found to be based on Nyquist's pro-desegregation positions, "bolstered those in Yonkers who hoped that the State would in fact leave Yonkers alone." Pet. App. at 82a. The State did not challenge these factual findings on appeal and, in any event, the Second Circuit found that the district court's factual findings were amply supported by the extensive record in this case. There can be little doubt that the district court determined — as a matter of fact — that the State's action and inaction contributed to and perpetuated school segregation in the Yonkers Public Schools.

Consistent with well-established precedent and the factual findings of the district court, the Court of Appeals correctly concluded that the State officials were liable under the Fourteenth Amendment and § 1983 for prospective injunctive relief to remedy school segregation in Yonkers for which they were responsible. This fact-intensive determination does not break new ground or merit review by this Court.

II. THE SECOND CIRCUIT'S HOLDING THAT THE EEOA EXPRESSLY ABROGATES THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT NECESSARY TO EFFECTUATE THE PURPOSES OF THE EEOA IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

The State also contends that the Second Circuit's holding that the EEOA expressly abrogates Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA is "aberrant" and "worthy of review." Pet. at 21. The State is wrong on both counts. The Second Circuit's holding is consistent with the plain language of the statute, the decisions of this Court, and the decisions of the two other Circuit Courts of Appeals that have addressed this issue.

From the face of the statute, it is clear that Congress enacted the Equal Educational Opportunity Act pursuant to its authority under § 5 of the Fourteenth Amendment to enforce the provisions of the Fourteenth Amendment. *See Castaneda v. Pickard*, 648 F.2d 989, 1008 n.9 (5th Cir. 1981). This Court has explained that "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citations omitted). The present statute, the EEOA, represents Congress' statutory means of enforcing

the provisions of the Fourteenth Amendment as against the States in the school desegregation context.

The State of New York, however, claims that the application of the EEOA to the State in this case runs afoul of the Eleventh Amendment and of the clear-statement rule announced and explained in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and subsequent decisions of this Court. In *Atascadero,* this Court held that "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Id.* at 242. In subsequent decisions, this Court has further explained that congressional intent to abrogate Eleventh Amendment immunity must be both "unequivocal" and "textual." *See, e.g., Seminole Tribe of Florida v. Florida,* 134 L. Ed. 2d 252 (1996).

The EEOA and its prohibitions are specifically and pointedly addressed to the States. Even under this Court's strict clear-statement rule, Congress' intent to abrogate Eleventh Amendment immunity as to the EEOA is both unequivocal and textual. In the decision below, the Second Circuit correctly held that the EEOA expressly abrogates "the states' Eleventh Amendment immunity to the extent necessary to effectuate the purposes of the EEOA," reasoning as follows:

> The EEOA (or the "Act") provides that "[n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." 20 U.S.C. § 1703 (emphasis added). Further, the Act forbids the state to perpetrate such a denial through various acts or omissions of an "educational agency." *See id.* §§ 1703(a)–(f). The Act defines "educational agency" as "a local educational agency or a 'State educational agency.'" *id.* § 1720(a) (emphasis added); *see also Idaho Migrant Council v. Board of Education,* 647 F.2d 69, 71 (9th Cir. 1981) (educational agency as used in EEOA includes a "state board of education").

United States v. Yonkers, 96 F.3d at 619; Pet. App. at 45a. The Second Circuit explained that the text of the EEOA explicitly provides that "[n]o state" shall engage in the prohibited conduct and expressly applies the EEOA prohibitions and remedies to "State educational agencies." Pet. App. at 45a–51a.

The Second Circuit's decision is consistent with the decisions of the two other Circuits that have addressed this issue. For instance, in *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1986), the Seventh Circuit engaged in the textual analysis required by *Atascadero* and its progeny and determined that the language of the EEOA plainly abrogated Eleventh Amendment immunity. The court reasoned that the EEOA specifically prohibited "states" from denying equal educational opportunities to individuals and imposed its restrictions and remedies directly on state educational agencies. *Id.* at 1037–38. The Ninth Circuit likewise has held that "the Equal Educational Opportunities Act clearly authorizes desegregation suits against state educational agencies," and abrogates Eleventh Amendment immunity. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, 467 U.S. 1209 (1984). *See also Idaho Migrant Council v. Board of Education*, 647 F.2d 69 (9th Cir. 1981). To hold otherwise would mean that Congress through the EEOA intended to impose the obligations of the EEOA on the States and their agencies, but did not intend to make the States and their agencies proper parties defendant under the terms of the EEOA. Such a reading of the statute makes little sense.

Additionally, to the extent that the Second Circuit's opinion requires the State to participate in the remedial desegregation efforts in Yonkers, it provides prospective injunctive relief consistent with this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken*, as here, the State defendants – who were found liable for school segregation – argued that the Eleventh Amendment prevented the federal court from requiring the State to participate in the

desegregation remedy. This Court flatly rejected that argument, as follows:

> The decree to share the future costs of educational components in this case fits squarely within the prospective compliance exception reaffirmed by *Edelman.* That exception, which had its genesis in *Ex parte Young,* 209 U.S. 123 [(1908)], permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. The order challenged here does no more than that. The decree requires state officials, held responsible for unconstitutional conduct, in findings which are not challenged, to eliminate a de jure segregated school system.

Id. at 289 (citation omitted). The Court concluded that "such prospective relief is not barred by the Eleventh Amendment." *Id.* at 290.

Here, as in *Milliken,* the Second Circuit has found the State liable for school segregation and now requires it to participate in prospective injunctive relief to remedy any vestiges of school segregation in Yonkers. Such relief falls squarely within the prospective-compliance exception reaffirmed by *Edelman v. Jordan,* 415 U.S. 332 (1974), and *Milliken*, notwithstanding an impact upon the state treasury. The Second Circuit's decision is consistent with the decisions of this Court and with the decisions of the Courts of Appeals and does not merit review.

III. THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST THE STATE UNDER THE EEOA IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE PREVIOUS DECISIONS OF THE COURTS OF APPEALS.

The State's final argument that the EEOA does not provide a basis for liability here is utterly specious. The State contends that imposition of liability against the State under the EEOA is inconsistent with the language of the statute and the Fifth Circuit's opinion in *United States v. State of Texas*, 680 F.2d 356 (5th Cir. 1982). Even a cursory reading of the statute and that case shows that the State misunderstands both.

The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by —
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;
>
> (b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps . . . to remove the vestiges of a dual school system . . .

20 U.S.C. § 1703; Pet. App. at 193a–194a. In its petition for certiorari, the State awkwardly concedes that this clear language *"might perhaps be read* as imposing on the States affirmative obligations." Pet. at 25 (emphasis added). The State then argues that the Court should abandon the plain language of the statute and adopt a "more natural reading" substituting "state action" for "State." *Id.* The State's argument is flawed and contrary to both the statute and case law.

The Second Circuit correctly held that the EEOA "provides substantive protections that 'considerabl[y] overlap . . . those

provided under the Fourteenth Amendment.' " Pet. App. at 47a (quoting *United States v. School District of Ferndale, Michigan,* 577 F.2d 1339, 1346 (6th Cir. 1978)). *Accord Castaneda v. Pickard,* 648 F.2d 989, 1001 (5th Cir. 1981). The Second Circuit explained that the EEOA also imposes on States the obligation to enforce the equal educational opportunity obligations of its state and local educational agencies. Pet. App. at 47a. The Second Circuit's decision here is consistent with both the decision of the Sixth Circuit in *School District of Ferndale* and the decision of the Fifth Circuit in *Castaneda.* The State points to no case contrary to this holding. Indeed, even the district court in this case explained that "it can be argued that if one were to set about to write a statute in a way that provided for vicarious State liability, one could not find language that was more clear and direct than that contained in § 1703 of the EEOA." Pet. App. at 105a. The State's imaginative reading of this statute does not warrant this Court's review.

The State also seeks this Court's review based upon an imagined conflict between the Second Circuit's decision here and the Fifth Circuit's decision in *United States v. State of Texas,* 680 F.2d 356 (5th Cir. 1982). The Fifth Circuit's decision in *United States v. State of Texas* was based on a truly bizarre set of facts. *See id.* at 370 ("The case is unique, and we proceed to the resolution of its appeal without great assurance or satisfaction."). In that case, the district court had based its finding of liability upon a stipulation that had been entered into by an inexperienced Assistant Attorney General who acted "without authority from her client and, in fact, in general disregard of its instructions to her." *Id.* at 368. The Fifth Circuit concluded that "a proceeding so fundamentally flawed" could not serve as a basis for liability or for the remedial orders entered by the district court. *Id.* The Fifth Circuit's decision in *United States v. State of Texas* was fact intensive and in no way conflicts with the considered legal holdings of the Second Circuit in this case, which were based on "amply supported factual findings" in the district court. The State here attempts to create a conflict where there is none.

CONCLUSION

The Second Circuit's decision in this case is entirely consistent with the decisions of this Court and the Courts of Appeals, and is supported by the district court's clear factual findings. The State has for too long avoided its responsibility to participate in the desegregative efforts of the Yonkers Public Schools. The City of Yonkers respectfully asks this Court to deny the State's petition for writ of certiorari.

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Respectfully submitted,

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